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No. 92-1358

In The

Supreme Court of the United States

October Term, 1992

DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the Court, in its certiorari discretion, review *Willis v. The Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992) (Pet. App. at 1-9) which reversed the district court's (Eastern District of Virginia, Norfolk Division) January 2, 1991 *Order Releasing Supersedeas Bond to Plaintiffs* (Pet. App. at 36-43)?

Stated otherwise, *at the present time,* are there special and important reasons for the Court's exercising its certiorari jurisdiction, the Fourth Circuit not having demonstrated an apparent departure from the accepted and usual course of judicial proceedings in vacating the district court's January 1991 order, which order conflicts with the bankruptcy court's extant injunction against petitioners' executing upon the supersedeas bond?

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BRIEF IN OPPOSITION

Respondent, The Celotex Corporation, opposes the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

OPINIONS AND JUDGMENTS BELOW

The United States Bankruptcy Court for the Middle District of Florida entered its October 17, 1990 order

precluding judgment creditors from proceeding in various state and federal courts against supersedeas bonds that The Celotex Corporation, a debtor in possession, had posted, without the approval of the bankruptcy court. Pet. App. 5, quoting *In re Celotex Corp.*, 128 B.R. 478, 482 (Bankr. M.D. Fla. 1991); *see* Celotex App. 1-4.

On January 2, 1991, the United States District Court for the Eastern District of Virginia entered its ORDER, reciting that it deemed that its own jurisdiction over a supersedeas bond posted by Celotex was "proper," therefore "GRANT[ING] release of the proceeds of the supersedeas bond." Pet. App. at 43.

The Fourth Circuit vacated the district court's January 1991 order, concluding that the Willis plaintiffs' "immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. . . . Consequently, the bankruptcy court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under [Bankruptcy Code § 105(a), 11 U.S.C.A.] § 105(a). . . . " Pet. App. at 9. The court stated in its vacating decision that the district court would be authorized to conduct "further proceedings at such time as the bankruptcy court lifts the § 105(a) stay." *Id.*

STATEMENT OF THE CASE

While not suggesting that petitioners have misstated the case (Petition at 4-8), it is apparent that they have overstated the facts, particularly with regard to the underlying personal injury claims, the posting of the

bond, and decisions by the bankruptcy and district courts. SUP.CT.R. 14.1(g) requiring a *concise* statement of the case containing the facts material to the consideration of the questions presented, the case is that two separate and independently created courts, the district court and the bankruptcy court[1], have entered conflicting orders. On October 17, 1990, the bankruptcy court entered a temporary injunction, *inter alia*, prohibiting personal injury claimants, including petitioners, from levying execution upon supersedeas bonds, posted by Celotex. Celotex App. 1-4. However, on January 2, 1991, the district court filed its order, *ante at 2*, the effect of which did not enhance petitioners' ability to collect the judgment, because the bankruptcy court's injunction was extant – the district court could not nullify that order.

The proceedings in the Eastern District of Virginia were premature as of January 2, 1991, the date of the district court's order; and, petitioners' filing here is equally premature. Indeed, the Fourth Circuit tacitly emphasized the lack of ripeness in that circuit: (a) the bankruptcy court might very well lift its stay[2]; and (b) the court concluded, "we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay."[3]

In other words, the Fourth Circuit resolved and disposed of any perceived problem that the district court might have created by filing an order at odds with the

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[1] U.S. CONST. art. I § 8; art. III §§ 1, 2.

[2] *Willis v. Celotex Corp.*, n.5 *supra at i* (Pet. App. at 8).

[3] *Willis, supra*, n.1 (Pet. App. at 9).

bankruptcy court's 11 U.S.C.A. § 105(a) (West 1993) stay order; or *vice verse,* any problem that the bankruptcy court might have created by entering the stay. Whether the bankruptcy court was correct, or whether the district court was correct is beside the point, at least for now, because petitioner has not yet asked the bankruptcy court to modify its § 105(a) stay order. Were the Willis petitioners to be unsuccessful in the bankruptcy court, their recourse is to the United States District Court for the Middle District of Florida and, if unsuccessful there, to the Eleventh Circuit. 28 U.S.C.A. § 158 (West 1968 & Supp.).

SUMMARY OF ARGUMENT

Petitioners have not presented for review a question that implicates SUP.CT.R. 10's "special and important reasons." The United States Court of Appeals for the Fourth Circuit has not rendered a decision that "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *Id.*

If petitioners are correct in their expressed concern as to a bankruptcy court's enjoining execution upon a supersedeas bond, given by the judgment debtor to stay execution upon a judgment, their Petition For Writ Of Certiorari is premature because they have not sought a modification of the injunction.

ARGUMENT

I

The Court's certiorari review being limited in the present context to the question whether the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings that there are special and important reasons for review, petitioners make no showing. Rather, they have submitted a redundant review of the principles of supersedeas bonds and stays of execution, and a rather petulant paraphrasing of the Fourth Circuit's holding, complaining that the circuit court has held that an otherwise valid and operable supersedeas bond loses its vitality, at least temporarily, "[i]f the judgment debtor becomes insolvent and files for protection under the Bankruptcy Code. . . . " Pet. at 8-12. It is not at all apparent that the instant bond has lost its "vitality" and, moreover, assuming *arguendo* that a bond is temporarily ineffective, it does not appear that the Fourth Circuit's decision constitutes a "depart[ure] from the accepted and usual course of judicial proceedings." SUP.CT.R. 10.1. Petitioners do not cite one authority for the proposition that the decision "departs."

Nor, is the petitioners' projected horror story, Pet. at 8-12, at all convincing. As a matter of fact, it is likely that one might conclude that it is as frivolous as Mr. Heller's description of how bored servicemen while away their time. *Id. at 9 n. 2.* Neither the bankruptcy court nor the Fourth Circuit has held that the supersedeas bond has lost its "vitality" or that petitioners will not collect their judgments. There is no evidence that the cost of bonds will be "inflated," *id. at 11*, or that the Fourth Circuit's

decision "will inevitably generate confusion in the courts concerning the scope of protection that must be afforded by a supersedeas bond in order [to] entitle a judgment-loser to a stay under [FED.R.CIV.P.] 62(d)," *id. at 11-12*. Supersedeas bonds are available as a matter of right to stay executions upon money judgments, the practice being that the trial court's approval of the bond is a mere formality, being limited to the question whether the particular insurer or the form of the bond is approved or appropriate.[4]

Moreover, the subject supersedeas bond *enhances* rather than depreciates petitioners' chances of collecting their judgments. It is indeed difficult to understand petitioners' logic in arguing that the specter of bankruptcy court injunctions prohibiting executions upon civil judgment supersedeas bonds would force debtors "to pay trial court judgments immediately, possibly driving them further toward insolvency." *Id. at 11*, citing *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 227 n. 3 (10th Cir. 1987). As the Fourth Circuit noted, Celotex faced 141,000 "asbestos-related personal injury actions" at the time when it filed for reorganization under Chapter 11 of the Bankruptcy Code on October 12, 1990. Pet. App. at 8, citing *In re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr. M.D. Fla. 1991). In the real world of massive tort litigation, manufacturers and distributors seek bankruptcy court protection for themselves and their creditors; they seek resolutions of very complex problems. Such cases do not

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[4] FED.R.CIV.P. 62(d): "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay. . . . The stay is effective when the supersedeas bond is approved by the court."

involve the isolated tort. Whether Celotex filed for protection when it did or earlier, when petitioners obtained their judgments, is beside the point because the existing tort system forced Celotex, a former manufacturer of asbestos-containing products, to seek protection under the Bankruptcy Code. Once that protection is sought the interests of *all* creditors mandate the maintenance of the status quo pending an evaluation of the fair and equitable treatment of many thousands of claimants.

Finally, petitioners' assertion that the Fourth Circuit's "opinion . . . will inevitably generate confusion in the courts concerning the scope of protection that must be afforded by a supersedeas bond . . . ", Pet. at 11-12, is rather extravagant, to say the least. There is no confusion in federal trial courts, because they are usually governed by state supersedeas rules which are clear cut in cases of money judgments. FED.R.CIV.P. 62(f).[5] Generally, in state court cases supersedeas is a matter of right to suspend execution upon civil judgments.[6] Thus there is no need

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[5] Rule 62(f): "**Stay According to State Law.** In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state."

[6] *See, e.g.*, FLA.R.APP.P. 9.310, 32 FLA.STAT.ANN. (West 1992 & Supp.): "**(STAY PENDING REVIEW)**: (1)*Money Judgments.* When the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review without the necessity of motion or order, on posting of a good and sufficient bond equal to the principal amount of the

for the Court's "act[ing] promptly to prevent unnecessary chaos in the federal and state courts. . . . " *Id. at 12.* There is, and will be, no chaos and confusion.

II

The threshold observation, as to petitioners' exaggerated and unsubstantiated statement that the Fourth Circuit held that bankruptcy courts have virtually limitless power, Pet. at 12, *subheading*, is that they have made their application to the wrong court. As the Fourth Circuit stated, the essential area of operations should be the bankruptcy court where petitioners have the absolute and unfettered right to make their application to lift the § 105(a) stay. If they are not satisfied with the court's ruling there, they are entitled to appeal it. Candidly, one must wonder why petitioners have labored so mightily in the Fourth Circuit which does not have jurisdiction over

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judgment plus twice the statutory rate of interest on judgments. . . . " Celotex maintains its principal place of business in Florida.

In Virginia, where the subject judgments were rendered and filed, the rule is substantively identical. VA.CODE.ANN. § 8.01-676.1 (Michie 1992): "**Security for appeal.** – C. *Security for suspension of execution.* – An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided in subsection D, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added by the courts."

the United States Bankruptcy Court for the Middle District of Florida.

Petitioners are disingenuous in their statements that the Court's assistance is required to correct the state of affairs as such pertain to the protection of judgment creditors, and to trial courts' approval of supersedeas bonds. Petitioners themselves have not brought this case here through the proper channel, the Eleventh Circuit. The bankruptcy courts and the United States District Courts are courts of limited jurisdiction, each having certain powers granted by Congress. Taking as a given the picture painted by petitioners – these separately and independently constituted courts have entered conflicting orders – the Fourth Circuit no more has authority to reverse the bankruptcy court's order than the Eleventh Circuit has authority to reverse the district court's order. In other words, petitioners have leapfrogged the Eleventh Circuit and the courts within its jurisdiction.

The adjective nature of the problem being understood, not much remains to be written about petitioners' arguments, supposedly premised upon Fed.R.Civ.P. 65.1, and § 524(e) of the Bankruptcy Code, 11 U.S.C.A. § 524(e) (West 1993). Rule 65.1 is the surety's consent to the district court's jurisdiction for enforcing (executing upon) the supersedeas bond, without necessity of filing a separate suit or action. Section 524(e) constitutes nothing more than the common sense proposition that discharge of a debtor in bankruptcy does not affect the liability of any other entity or the property of such entity. Petitioners' statement that the bankruptcy court's injunction "directly conflicts with [Rule 65.1 and § 524(e)]", Pet. at 13, is patently without merit. Of course Aetna Casualty &

Surety Company submitted to the district court's jurisdiction, but such is irrelevant in light of the bankruptcy court's jurisdiction to enjoin petitioners' executing upon the bond. It is not necessary to further burden the Court as to § 524(e), there having been no discharge as of this time.

If petitioners are correct in their various arguments, *e.g.*, that the Fourth Circuit "cannot [ ] explain" how precluding execution upon the supersedeas bond facilitates the bankruptcy court's controlling all litigation involving Celotex, Pet. at 16, it is readily apparent that they have simply wasted time and resources in the Fourth Circuit. Without criticizing that circuit, we are left wondering how *any* order by that court would affect a bankruptcy court's decision in Florida. The best advice for petitioners is that tacitly enunciated by the Fourth Circuit: petitioners are entitled to file their application in the bankruptcy court seeking a modification or lifting of the § 105(a) stay and, if unsuccessful there, they may seek a reversal in the Middle District of Florida or in the Eleventh Circuit. If the Eleventh Circuit courts rule incorrectly, petitioners are entitled to seek the Court's discretionary certiorari review of an important matter that manifests a departure from the accepted and usual course of judicial proceedings. SUP.CT.R. 10.1(a).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF § 362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF § 362 TO PENDING MATTERS ..... App. 1

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.: 90-10016-8B1 and 90-10017-8B1
Debtors. /	

ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF §362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF §362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;

b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;

c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;

d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and

g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on October 17, 1990.

/s/ Thomas E. Baynes
Thomas E. Baynes, Jr.
United States Bankruptcy
Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors